IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 12 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAKSON ENG. LTD.

Versus

ATMA NATURAL FIBRES PVT.LTD.

Appearance:

1. COMPANY PETITION No. 12 of 2000

MR MB GANDHI for Petitioner No. 1

MR BN KESHWANI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 24/02/2005

ORAL JUDGEMENT

1. The petitioner - M/s. Jackson Engineers Ltd. has filed this petition under sec. 433 read with sec. 434 of the Companies Act, 1956, for winding up of the

respondent-company.

2. The petition was admitted by this court on 13.12.2000, however, the advertisement was differed for the time being. Against the said order of admission, the respondent-company has filed an appeal being OJ Appeal No. 4/2001 and the said appeal was not entertained by the Division Bench of this Court at that stage for the reason that it would be open for the respondent-company to raise all issues before the ld. Single Judge as and when the petition was ordered to be notified for hearing. In this view of the matter, the said appeal was dismissed. Thereafter, the ld. Single Judge of this court has passed an order on 11.10.2001 stating that there was no reason to further defer the advertisement and it was necessary to direct the publication of advertisement as ordered on 13.12.2000. The petition was ordered to be advertised in the local daily newspaper Indian Express (English) and Jansatta (Gujarati) with final hearing date as 29.11.2000. The advertisement in the Official Gazette was dispensed with.

3. Being aggrieved by the said order, the respondent-company has filed another appeal being OJ Appeal No. 37/2001 and the same was dismissed as having been withdrawn on 18.1.2002. While dismissing the said appeal as withdrawn, the Division Bench of this court permitted the respondent company to withdraw the said appeal to enable them to file a review application before the ld. Single Judge. The court has also granted stay against the operation of the order of advertisement till 6.2.2002. The respondent-company thereafter filed review application being OJ MCA No. 34/2002 which also came to be rejected by this court vide order dated 7.3.2003. This court has, thereafter passed an order on 17.3.2003 observing that as the review petition has been now finally disposed of, the order with regard to admission shall be published in the newspapers as referred to in the order dated 11.10.2001. The petition was, thereafter, advertised and affidavit of advertisement was filed on 23.4.2003. Along with the said affidavit, news paper cuttings containing the said advertisement were also attached.

4. Heard Mr MB Gandhi ld. advocate for the petitioner and Mr. BN Keshwani ld. advocate for the respondent-company. It is the case of the petitioner that there were business dealings between the petitioner and respondent - company and in the year 1996-97, the petitioner had to supply to the respondent company three DG Sets of the capacity of 1000 KVA and that transaction

was complete. Thereafter, the respondent-company wanted to buy two more DG Sets of the capacity of 1250 KVA and, therefore, the respondent-company placed an order with the petitioner on 10.11.1997 to buy 2 x 1250 KVA DG sets of the value of Rs. 90 lacs plus Excise Duty at 13% of the company price and accordingly, two bills for the sale of two DG Sets were prepared and the value of each DG Set was to the tune of Rs. 50,85,000/- including Excise Duty.

5. It is also the case of the petitioner that at the time of entering into agreement for sale, it was agreed by and between the parties that the DG Sets would be supplied and installed at M/s. Mahendra Mills Ltd., Ambedkar Road, Kalol (North Gujarat), Dist. Mehsana. Thereafter, on inquiry, with the party, it came to the notice of the petitioner that the respondent has engaged in trading only and it has no other manufacturing units and, therefore, the intention of the respondent company was to lease out the said DG Sets to the concerned customers of the respondent and, therefore, these large DG Sets were ordered to be installed at M/s.Mahendra Mills Ltd., Kalol.

6. It is further stated that according to the information available with the petitioner at the relevant time, the said M/s. Mahendra Mills Ltd., was closed down by the then owners and thereafter, the present respondent had entered into an agreement with the owners of the said Mill company as well as the labourers for running the Mill and according to the information, on lease-hold basis, the mills company was taken over by the present respondent to run the mills and when the mills-company was taken over, the electric connections and other facilities were already disconnected and huge amount of Electricity bills were outstanding and, therefore, unless and until that amount was paid by the party concerned, Gujarat Electricity Board was not prepared to supply power. Under the circumstances, the respondent-company had purchased the DG Sets to generate the electricity with the help of diesel and to run the mills company. The new DG sets purchased from the present petitioner were directly installed in the said mills company viz. M/s. Mahendra Mills Ltd. and both the DG Sets are still lying and working in the said mills company. The electric power of the said mills company was not sufficient and, therefore, one more DG Set of 1000 KVA which was previously purchased by the respondent company was installed in the said mills company and at present, three DG Sets are working in the said Mill company.

7. It is further stated that when the goods were sold, the terms and conditions provided that the respondent-company was to make the payment of Rs. 1,01,70,000/- in 12 different installments. The rate of interest was also agreed upon at 17% p.a. ad accordingly, along with the interest, the installments were fixed. Since two DG Sets were purchased, the agreement for payment also provided two installments of the same date for each DG Set and for interest also, the separate amount was mentioned and thus, the installments begun from 12.1.1998 and interest also was to be paid from 12.1.1998 as per the amount mentioned in the agreement dated 15.11.1997.

8. It is further submitted that respondent company while putting the order had made the advance payment of Rs. 8,47,500/- on 13.11.1997 for one DG Set and similar amount was also given in advance for another DG Set. The respondent has paid 20 post dated cheques alongwith the agreement dated 15.11.1997 to the petitioner. It is further stated that on the relevant dates, the cheques were sent for encashment and in the month of January, 1998, cheques of the amount of Rs. 9,67,562-50 with 17% interest were cleared. It is further stated that till March, 1998, the party had cleared the cheques to the extent of Rs. 16,25,000/- as against Rs. 18,99,106-20. The cheques were however, dishonoured thereafter. As a result of dishonouring of the cheques and non-payment as per the agreement dated 15.11.1997, the respondent-company again in April, 1998 came to the petitioner and for the period April to July, 1998, respondent company had given the different cheques out of which, two cheques of Rs. 50,000/- each were returned by the Bankers. Some cheques which the party had given were cleared and ultimately at the end of July, 1998, the petitioner company had the outstanding dues to be recovered from the respondent company to the tune of Rs. 50,01,946/- plus interest as per the agreement.

9. Inspite of an agreement, the party did not come forward to make the payment and only assurances were given and as a result thereof, the petitioner company had to follow the respondent and its Directors to get the payment as per the agreement. However, the petitioner could not receive any amount from the respondent and ultimately, the respondent company again came forward and entered into another agreement with the petitioner on 2.6.1999. As per the said agreement, the respondent-company has admitted about the purchase of two DG Sets of 1250 KVA in November, 1997 and also admitted that they had issued post dated cheques but, due to the

financial difficulties from May, 1998, the post dated cheques could not be cleared and as the respondent-company was hopeful of getting the amount, the respondent-company issued the post dated cheques beginning from 15.3.1999 onwards and some 24 cheques of different amounts with an assurance to clear the same within one month were given. The cheques mentioned in the agreement dated 2.6.1999 were sent to the Bank for encashment but all the 24 cheques were dishonoured. The petitioner, thereafter, issued notice under sec. 138 of the Negotiable Instruments Act and an opportunity was given to the respondent to clear all the cheques. However, the payment was not made and hence, the petitioner was constrained to file the present petition for winding up of the respondent-company.

10. Mr. MB Gandhi ld. advocate for the petitioner has submitted that looking to the conduct of the respondent company, it is obvious that the respondent company is not capable to make the payment and the cheques were repeatedly bounced. This fact itself proves that the respondent-company was financially unsound and was not capable to make the payment and, therefore, the company is required to be wound up under the provision contained in sec. 433 of the Companies Act, 1956.

11. The respondent company has filed its reply to the petition on 11.12.2000.Mr. Keshwani ld. advocate for the respondent company has submitted that before filing the present winding up petition against the respondent company the statutory notice was neither issued nor served on the company. Mr. Keshwani ld. advocate has relied on the decision of the Allahabad High Court in the case of Paramjit Lal Badhwar vs. Prem Spinning & Weaving Mills Co. Ltd. and Ors., reported in 1983 TAX L.R. p. 2506, wherein, it is held that it is not necessary, in law, that the notice should specifically mention S. 434(1)(a) of the Companies Act, but there should be some indication given to the company that in case of non compliance with the terms of a notice, the petitioner will take steps, for winding up of the company under the provisions of the Companies Act. In the instant case, the petitioner did not mention the period within which his demand was to be fulfilled. He only conveniently asked the company to remit the amount at an early date. This cannot constitute a valid notice under sec. 434 of the Companies Act. He has further submitted that the petition clearly shows that the petitioner has virtually filed suit for recovery of disputed amount in the guise of a winding up petition. He further submitted that this is clearly a case of disputed claims and these disputed

claims cannot be decided in the present petition. He has further submitted that the petitioner is not entitled to claim any interest on the purchase price of the DG Sets. However, petitioner has claimed interest at the rate of 17% per annum. He has further submitted that the DG Sets supplied by the petitioner were not of standard quality and one of the DG Sets supplied by the petitioner was so inferior in quality that it could not work. With great persuation, petitioner took back the same but thereafter petitioner offered only Rs. 9 lacs for the price of the DG Set which is worth more than half a crore of rupees. He has further submitted that the petitioner has taken back the aforesaid DG Set after full verification but subsequently, raised false contention that some parts of DG Set were missing and under this pretext, the petitioner offered only Rs. 9 lacs to which respondent-company never agreed. He has further submitted that the respondent company declined to give back DG Set at such low price and requested the petitioner to return the DG Set but petitioner has not so far returned it after giving assurance from time to time to return the same. He has therefore, submitted that the price of this DG Set was to be adjusted against the dues payable by the respondent, and if the price of this set is adjusted, nothing would be payable to the petitioner by the respondent.

12. Mr. Keshwani has further submitted that unless the account between the parties are settled, no definite amount can be arrived at as the amount due to the petitioner. He has further submitted that the petitioner had realised certain cheques but it has intentionally suppressed the amount realised and simply made a vague statement that some cheques were not cleared.

13. Mr. Keshwani has further submitted that the proper remedy for the petitioner is to file civil suit but instead of filing civil suit, the petitioner has filed the present petition for winding up only with a view to pressurize the respondent to agree and to accept the false claim of the petitioner.

14. During the course of pendency of this petition, affidavit of changed circumstances was filed on behalf of the petitioner on 11.12.2000. Based on this affidavit, Mr. Gandhi has submitted that on visit by the representative of the petitioner to the premises of M/s. Mahendra Mill Ltd., where the DG sets are lying, it was found that out of three DG Sets lying in the said company which were given on lease by the present respondent, one set was totally out of order and was not working and so

far as the other two sets are concerned, instead of diesel being utilised, other material/fuel was used by the labourers by whom Mill was run, and, therefore, those sets were totally rendered useless. Under these circumstances, the petitioner has requested the court to pass immediate orders of attachment and safe custody of the said DG Sets. This prayer was objected by the respondent-company in the affidavit in reply filed on 13.12.2000, wherein the facts stated and the averments made in the affidavit of the petitioner were denied. It is further stated in the said affidavit in reply that the respondent company has been regularly paying to its creditors and not a single creditor of the respondent company has served the respondent company with demand notice. It is further stated that it is only because of the dispute the respondent company has not paid the disputed amount to the petitioner company.

15. After having heard the ld. advocates appearing for the respective parties and after having gone through their respective pleadings as well as the documents attached therewith, the court is of the view that no bonafide defence is raised by the respondent company. Despite there being specific agreement, the amount was not paid by the respondent company to the petitioner. Cheques which were issued were also bounced. There is no denial of the fact that the DG Sets were supplied by the petitioner. There is also no denial of the fact that the said DG Sets were in working condition. The dispute regarding inferior quality of the DG Sets was raised for the first time in the affidavit in reply without any corroborative evidence to that effect. There is no substance in the submissions of Mr. Keshwani that the respondent company was not served with the statutory notice and hence, petition is not maintainable. As a matter of fact, the notice under sec. 138 of the Act was issued by the petitioner to the respondent company and the demand was raised to make the payment of the outstanding dues. It is, however, not necessary to specifically mention in the notice that failure to make the payment would entail the winding up proceedings. This court is not in agreement with the proposition laid down by the Allahabad High Court as it is not necessary in law that the notice should specifically make reference of sec. 434(1)(a) of the Act. It is also not necessary in law to specifically mention in the notice that the failure to make the payment would entail winding up proceedings. Even otherwise in that case, the court has further held that however, even if the notice is invalid, the petition is still maintainable in law and it is open to the petitioner to challenge the inability of the

company to pay its debts. In the present case, the petitioner has proved before the court that the respondent company is unable to pay its debts as the cheques were bounced and amount remained outstanding despite several requests and issuance of notice under sec. 138 of the Negotiable Instruments Act. There is also no substance in the defence raised by Mr. Keshwani that the disputed claim is made by the petitioner and proper course would be to file suit before the competent court. There is no dispute as such with regard to supply of DG Sets. Amount being outstanding, issuance of cheques and non-realisation of the said cheques ect. all these facts, undoubtedly proved that the petitioner has the legitimate claim against the respondent company and the respondent company has failed or neglected to discharge its liability towards the petitioner. The court is, therefore, of the view that the respondent company is required to be wound up under the provisions of the Companies Act, 1956. The company is accordingly ordered to be wound up. The Official Liquidator attached to this court is hereby appointed as Liquidator of the respondent company and he is directed to take charge of all the assets of the respondent company. It is, however, made clear that the Official Liquidator shall intimate to the secured creditors and anyone or more Directors of the respondent company at the time of taking over the charge of the assets of the respondent company. It is further clarified that before taking inventory of the assets of the respondent company or before appointing valuer as well as security agency, the respondent company should take prior permission of this court.

16. With the aforesaid directions and observations, this petition is accordingly allowed without any order of cost.

(K.A. PUJ, J.)

mandora/